NO. 87-1405

Supreme Court, U.S.
FILED
JAN 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JUAN GONZALES, JR.,
Petitioner

VS.

RUDY LEAL, JR.; MARC GALLARDO; and
THE CITY OF SAN ANTONIO,

Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

The courts below have ruled that the Petitioner does not have a cause of action for constitutional violations under 42 U.S.C. Sec. 1983 because the Officer in question did not cause severe injuries, which were grossly disproportionate to the need for action under the particular circumstances, and the Officer did not act with malice. The question presented for review is:

f. Under 42 U.S.C. Sec. 1983, what standard of conduct is applied to an arresting officer to determine whether the arrestee has suffered a violation of his constitutional rights.

List of All Parties

The parties are:

1. Juan Gonzales, Jr., Petitioner;
2. Rudy Leal, Jr., Respondent;
3. Marc Gallardo, Respondent; and
4. The City of San Antonio, Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JUAN GONZALES, JR., PETITIONER

VS.

RUDY LEAL, JR.; MARC GALLARDO and
THE CITY OF SAN ANTONIO, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States:

Juan Gonzales, Jr., who is the petitioner, petitions the Court to issue a writ of certiorari to the United States Court of Appeals and to review by that writ the judgment which the Court of Appeals rendered on October 7, 1987.

OPINION DELIVERED IN THE COURT BELOW

The Court of Appeals delivered an opinion which is not published. A copy of the opinion is in the Appendix. The District Court for the Western District of Texas did not deliver an opinion, but it did make findings of fact and conclusions of law.

A copy of the transcript of the findings of fact and conclusions of law are in the Appendix.

Statement of Jurisdiction

On October 7, 1987, the Court of Appeals rendered and entered the judgment sought to be reviewed. Pursuant to 28 U.S.C. Sec. 1254(1).

Statute Involved in the Case

42 U.S.C. Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia. (R.S. Sec. 1979; Dec. 29, 1979, P.L. 96-170, Sec. 1, 93 Stat. 1284).

Statement of the Case

1. Nature of the Case

This is a civil case where Petitioner sought redress of grievances under 42 U.S.C. 1983. The court below dismissed the action after a bench trial using the test established by the Fifth Circuit in Schillingford v. Holmes, 634 F.2d 263 (5th Cir., 1981).

2. Facts Material to the Question Presented

At the time of the arrest of the Petitioner, he was in the presence of seven other individuals who testified that he was handcuffed and that his head slammed into the back of a parked vehicle, causing severe damage to his face and nose.

The testimony of the arresting officer conflicted with that of the seven witnesses at the scene, whereby he stated that the only car he pinned Petitioner against was his patrol car.

3. Basis for Federal Jurisdiction in the District Court

The basis for federal jurisdiction of the United States District Court, which is the court of first instance, is 42 U.S.C. 1983.

Reasons Relied on for the Allowance of the Writ

1. Conflict in Decisions on the Standard Applied to Violations Under 42 U.S.C. 1983

The question presented to the court at the District Court level, as well as the Appellate level, is whether the actions of the police officer were of such a nature to cause a violation of the civil rights of the Petitioner. The decision of Schillingford v. Holmes, supra relied upon by the Fifth Circuit Court of Appeals is a three-prong test, whereby the court must determine one, whether the state officer's actions caused severe injuries; two,

whether such action was grossly disproportionate to the need for action under the particular circumstances; and three, whether such action was inspired by malice, rather than mere careless or unwise excess of zeal, so that it amounted to use of official power that shocks the conscious.

This standard applied by the Fifth Circuit is an extremely onerous standard leading to a disproportionate finding by District Courts, as well as the Fifth Circuit Court of Appeal, of no violation of constitutional rights under 42 U.S.C. 1983. However, the Circuits have varying standards resulting in an inequitable application of 42 U.S.C. 1983 between the Circuits.

In McKenzie v. Lamb, 738 F.2d 1005 (9th Cir., 1984), the Court found that two plain clothes police officers violated 42 U.S.C. 1983 without inflicting any physical injuries to the Petitioner. In Bellows v. Dainack, 555 F.2d 1105 (2nd Cir., 1977), the officers merely twisted the arm of the arrestee and struck him in the ribs to cause a violation of 42 U.S.C. 1983.

In Patzner v. Burkett, 779 F.2d 1369 (8th Cir., 1985), the Court found that actions which resulted in an arrestee being dragged up and down the stairs by municipal deputies was a violation of 42 U.S.C. 1983. The Fifth Circuit Court of Appeals has instituted the need for severe injuries when other Circuits

have not used that standard. The Fifth Circuit has further determined that there must be malice on the part of the police officer, which again is a standard that is not being adhered to by the other Circuits. Finally, in Henshaw v. Doffer, 785 F.2d 1260 (5th Cir., 1986), the Fifth Circuit has contradicted itself and implied malice from the evidence rather than an express showing as required in the case at bar.

This Court should therefore decide whether the question of violation of 42 U.S.C. 1983 requires a finding of malice and whether there is a necessity for serious injury. After deciding that question, the Court should either vacate the judgment rendered by the Court of Appeals and remand it or reverse the Judgment and decide the question of the standard for violation under 42 U.S.C. 1983 so as to have a uniform standard throughout the circuits.

2. Important Question of Federal Law

In Baker v. McCollan, 443 U.S. 137, 99 S.Ct 2689, 61 L.Ed. 2d 433 (1979) and Parratt v. Taylor, 451 U.S. 527, 101 S.Ct 1908, 68 L.Ed.2d 420 (1981), the Supreme Court decided crucial issues in the application of 42 U.S.C. 1983 and the violation of constitutional rights of arrestees by police officers. The problem that has taken place since that date is that the Circuits have been

allowed to determine the standard for application of 1983 violation cases. This Court should decide a uniform standard to be followed by all Circuits in this very important question of constitutional rights.

Conclusion

For these reasons, the Court should issue a writ of certiorari and review the judgment rendered by the Court of Appeals.

Respectfully submitted,

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Counsel for Petitioner

Certificate of Proof of Service

Pursuant to Sup. Ct. R. 28 and 46, on January 5, 1988, and on behalf of the Petitioner, I served three copies of this document on each party to the proceeding, and on all parties required to be served, by delivering it by mail in a wrapper, with first-class postage prepaid, which I deposited with the United States Postal Service, and which I addressed to:

Mr. Lawrence J. Souza
335 South Presa
San Antonio, Texas 78205

Mr. Steven W. Arronge
Assistant City Attorney
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JAMES A. KOSUB

Appendix

1. Opinion Delivered by the Court of Appeals
2. Judgment Sought to be Reviewed
3. Findings of Fact and Conclusions of Law by the District Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-5516
Summary Calendar

JUAN GONZALES, JR.,

Plaintiff-Appellant,

versus

RUDY LEAL, JR.,
MARC GALLARDO, and
CITY OF SAN ANTONIO, TEXAS,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-84-1518)

(October 7, 1987)

Before CLARK, Chief Judge, WILLIAMS and DAVIS, Circuit Judges.

PER CURIAM:*

Appellant, Juan Gonzales, Jr., sues police officers Rudy Leal, Jr. and Marc Gallardo in their individual and official capacities, and

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the Court has determined that this opinion should not be published.

also the City of San Antonio, Texas, under 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 1331 and 1343(3), for violation of his Fourteenth Amendment due process rights, possibly other constitutionally protected rights, and for damages in connection with injuries sustained in the course of his being arrested. Prior to trial, the district court granted a motion to dismiss with prejudice appellant's suit against the city. At the close of appellant's case at bench trial, the court granted appellee Gallardo's motion for a directed verdict in his favor on the basis of insufficient evidence. After trial, the court dismissed with prejudice appellant's claims against appellee Leal under §§ 1983 and 1988. We affirm.

On the evening of December 17, 1983, appellant along with some seven other males were on residential property in San Antonio, gathered around a bonfire near a public street. Some had been drinking beer; a car radio one or two men had been repairing was turned on. At approximately 10:15 P.M., appellees Leal and Gallardo arrived in separate police cars. Both were in uniform and both police cars were clearly marked as such. Appellee Leal told the men that the officers were there in response to a complaint about loud music and a fire, and asked them to turn off the music and put out the fire which was in violation of a city ordinance. Both orders were carried out.

In order to ascertain who owned the home and whether those present had permission to be on the property, appellee officers asked everyone to present identifications. Most did so, but appellant did not

although he was asked to do so several times. He asked the officers why he should, and told them to leave since they were on private property. Officer Leal then undertook to arrest appellant for failure to identify himself. He secured appellant's left wrist in handcuffs, but appellant persisted in evading appellee Leal's efforts to handcuff his right wrist, claiming that doing so was hurting him. Appellee Leal continued to hold appellant's left arm, trying to turn him around so as to secure both wrists in handcuffs behind appellant's back, in accordance with standard procedure. In the course of the struggle both men fell, or appellee Leal pushed appellant against a chain link fence, either once or twice. Neither was injured. The struggle continued. As the two neared one of the police cars, appellee Leal pushed, threw, or slammed appellant against the side of the car, in order to get him off balance and complete the handcuffing. Since appellant's right arm was extended beyond officer Leal's reach, officer Gallardo, who in the meantime had been observing the other males and checking their I.D.'s, helped appellee Leal finish putting the handcuffs on appellant.

At this point, both officer appellees noticed that appellant was bleeding, his nose evidently having banged against the top of the car. On instructions from appellee Leal, appellee Gallardo immediately called for EMS (Emergency Medical Service). Appellant refused medical treatment when EMS arrived and also later when Leal took him to a nearby hospital and then to the county jail clinic. At trial, appellant stated that he had refused treatment until he could have

photographs taken to preserve evidence of his injuries. His physician, who had treated him on two or three previous occasions for nose injuries, testified by deposition that appellant's nose had sustained laceration and fracture, and that he subsequently treated him by corrective surgery.

Appellant raises five questions for review: (1) whether the district court erred in granting the city's motion to dismiss it from the suit; (2) whether it erred in dismissing appellee Gallardo; (3) whether it erred in dismissing appellant's claims for violation of his Fourteenth Amendment due process rights under 42 U.S.C. § 1983 and for attorney's fees under § 1988; (4) whether it erred by abusing its discretion and ruling against the greater weight of the evidence; and (5) whether it erred by failing to rule on appellant's separate or remaining claims under 28 U.S.C. §§ 1331 and 1343(3) for deprivation of his Fourteenth Amendment equal protection and due process rights, and his Eighth Amendment protection from cruel and unusual punishment. We hold that the district court did not so err.

I. San Antonio's Motion to Dismiss

Appellant argues that the city is liable under § 1983 for tortious acts by its police officers either on the theory of respondeat superior or on the theory that the city had a custom or unwritten policy of allowing and condoning police officers' abuse of handcuffed suspects. Neither theory implicates the city on these facts. In Monell v. Department of Social Services, 436 U.S. 658, 691-692, 98 S.Ct. 2018, 2035-2036 (1978), the Supreme Court held that § 1983 suits could be brought directly against municipalities for deprivation of constitutional rights pursuant to either official policy or unofficial governmental custom, but not on the basis of respondeat superior theory. This prohibition has not been eroded by subsequent decisions, and this Court has recently re-affirmed that municipal liability under section 1983 cannot be found on respondeat superior theory. Lopez v. Houston Independent School District, 817 F.2d 351, 353 (5th Cir. 1987).

With respect to the custom or unwritten policy theory, this Court requires plaintiffs to prove facts regarding the existence of such a custom or policy. Palmer v. City of San Antonio, 810 F.2d 514, 516-517 (5th Cir. 1987). Appellant failed to offer any factual evidence to support his allegation that appellee city had an unwritten policy allowing officers to abuse handcuffed suspects. Appellant refers to Pembaur v. City of Cincinnati, 475U. S. ___, 106 S.Ct. 1292, 1298-1300 (1986) to show that a municipality can be held liable under

§ 1983 for enforcing even once the unconstitutional order or decision of a municipality official who has final authority to establish municipal policy with respect to the action ordered. In Pembaur, the decision carried out was made by the County Prosecutor, who, under Ohio law, had policy maker status. Id. at 1301. Appellant's argument that appellee Leal was a city policy maker within Pembaur is totally lacking in merit. No Texas law provides that police patrol officers may make municipal policy.

II. Dismissal of Appellee Gallardo

The district court dismissed appellant's claims against appellee Gallardo on the ground that appellant offered insufficient evidence that this appellee had injured him. The facts found by a trial court are subject to appellate review only under the clearly erroneous rule, Fed.R.Civ.P. 52. The court's finding of facts were not clearly erroneous. Appellant argues that appellee Gallardo took part in the alleged beating of appellant by failing to stop or prevent appellee Leal from injuring him. Since we hold that evidence did not support a claim that officer Leal had violated any of appellant's federally protected rights, it clearly was not error to dismiss appellant's claim that officer Gallardo failed to prevent officer Leal from interfering with such rights. Moreover, appellant did not allege under 42 U.S.C. §§ 1985 or 1986 conspiracy or a failure to protect him from injury to any federally protected rights at the hands of other persons.

III. Dismissal of Appellant's Claims under 42 U.S.C. §§ 1983 and 1988

Appellant's basic claim is that appellee Leal used excessive force in effectuating his arrest. The dispositive question is whether appellee Leal's use of force was so excessive that it violated appellant's constitutional rights as implemented by § 1983. In Schillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981), this Court set out the analysis to be used in determining whether a police officer has used force so excessive as to bring that conduct within § 1983. The key questions in Schillingford analysis are:

1. Whether the state officer's action caused severe injuries;

2. Whether such action was grossly disproportionate to the need for action under the particular circumstances; and

3. Whether such action was inspired by malice rather than mere careless or unwise excess of zeal so that it amounted to use of official power that shocks the conscience.

Id. at 265.

We have found equal or greater exercise of force by police officers than that used in this case to fall below the level required for invocation of § 1983 under the Schillingford analysis. Raley v. Frazier, 747 F.2d 287, 288-290 (5th Cir. 1984). In applying Schillingford in the present case, the district court concluded:

> (T)he force used by Officer Leal to effect the lawful arrest was necessary. Under the circumstances, it was necessary for Defendant Leal to push the resisting plaintiff against a vehicle in order to handcuff the suspect. Plaintiff has failed to prove the defendant acted

> with malice or used force which was grossly disproportionate to the need for action. Certainly the conduct of Defendant Leal does not rise to the level of gross abuse of power actionable under Section 1983.

A review of the record on appeal makes clear that the district court's findings were supported by the evidence. There was no clear error.

IV. Separate claims under the U.S. Constitution and 28 U.S.C. §§ 1331 and 1343(3)

Appellant contends that even if the trial court properly dismissed his § 1983 claim, it erred by failing to consider separate or remaining claims for violation of his Fourteenth Amendment equal protection and due process rights and his Fourth (sic) Amendment protection against cruel and unusual punishment, raised under 28 U.S.C. §§ 1331 and 1343(3). The district court justifiably stated no findings of fact or conclusions of law respecting these claims. Appellant had not briefed or argued any Fourteenth Amendment equal protection or Fourth (or Eighth) Amendment cruel and unusual punishment claims before the district court, and only alludes to these claims on appeal. We do not consider them.

Section 1983 has been held to be a purely remedial statute; that is, it provides no substantive rights, but creates a remedy for violations of rights secured by federal statutes and the constitution. Maine v. Thiboutot, 448 U.S. 1, 4, 100 S.Ct. 2502, 2504 (1980); Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617-18, 99 S.Ct. 1905, 1915-16 (1979); Irby v. Sullivan, 737 F.2d 1427

(5th Cir. 1984). Although appellant does not so specify, we assume that his § 1983 claim was grounded on appellees' alleged contraventions of his Fourteenth Amendment due process rights, presumably his liberty, if not also property interests. Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir.), cert, denied sub nom. John v. Johnson, 414 U.S. 1033, 94 S.Ct. 462 (1973). Since appellant did not prevail on his § 1983 action, his Fourteenth Amendment due process claim has been adjudicated. 28 U.S.C. §§ 1331 and 1343(3) are jurisdictional statutes, and afford appellant no additional substantive rights.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-5516
Summary Calendar
D.C. Docket No. SA-84-CA-1518

JUAN GONZALES, JR.

Plaintiff-Appellant,

versus

RUDY LEAL, JR., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas

Before CLARK, Chief Judge, WILLIAMS, and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

October 7, 1987

ISSUED AS MANDATE:

A TRUE COPY
TEST
Clerk, U.S. Court of Appeals, Fifty Circuit
BY: /s/ M. Thompson
Deputy Oct. 29, 1987
New Orleans, Louisiana
OP-JDT-9C
Rev. 4/85

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS-SAN ANTONIO DIVISION

JUDGMENT IN A CIVIL CASE
CASE NUMBER: SA-84-CA-1518

JUAN GONZALES, JR.
V.
RUDY LEAL, JR., A SAN ANTONIO POLICE OFFICER
et al

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

ORDERED THAT PLAINTIFFS CLAIMS UNDER 42 U.S.C. §§ 1983 and 1988 ARE DISMISSED WITH PREJUDICE.

JANUARY 26, 1987
Date

CHARLES W. VAGNER
Clerk

/s/ Diana Westoner
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JUAN GONZALES, JR.,
Plaintiff,

VS. Civil Action No. SA-84-CA-1518

RUDY LEAL, MARC GALLARDO
and CITY OF SAN ANTONIO,
Defendants.

ORDER

On August 7, 1984, plaintiff filed this civil rights action against defendants alleging that they violated his constitutional rights by using excessive force during an arrest of plaintiff on December 17, 1983. Plaintiff alleges that Defendant Leal used excessive force by thrusting his head forward against a car while attempting to arrest him and that Defendant Gallardo was liable by failing to stop or prevent Defendant Leal from injuring plaintiff.

On January 14 and 15, 1987, this matter was tried before the Court. At the conclusion of plaintiff's case, Defendant Gallardo raised a motion to dismiss pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. The Court granted Defendant Gallardo's motion. Both defendants voluntarily dismissed their counterclaims against plaintiff. Having considered all of the evidence presented, and in accordance with Federal Rule of Civil Procedure 52, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Juan Gonzales is a 30-year old Hispanic male who resides in San Antonio at 1504 Loma Vista Street. Gonzales stands five feet seven inches tall and weighs approximately 145 pounds.

2. Defendant Marc Gallardo is a San Antonio Police Officer who has been a member of the force for 3-1/2 years.

3. Defendant Rudy Leal, Jr., is a San Antonio Police Officer who has been a member of the force for approximately six years. Leal stands approximately six feet tall and weighs approximately 185 pounds.

4. On the night of December 17, 1983, Officers Leal and Gallardo, driving separate patrol cars, responded to a dispatcher's call regarding a disturbance at the corner of Hidalgo and Mintor Street in west San Antonio. The complaint concerned the playing of loud music and a fire.

5. Upon arriving at the scene, the officers observed eight individuals standing in the vicinity of a fire which was burning between the sidewalk and the fence line of 1822 Hidalgo Street. Music was playing from a car radio parked in front of the house and yard. Defendant Leal testified that the music was not overly loud.

6. Several of the individuals were drinking beer, and one individual, Gabriel De Leon, was obviously drunk, by his own admission.

7. Officers Leal and Gallardo had reasonable cause to believe that the burning of the fire constituted a violation of a San Antonio city ordinance.

8. Both defendants exited their patrol cars and approached the individuals standing near the fire. Defendant Leal informed the group of the complaint and asked that the music be turned off and the fire doused. Some of the individuals in the group complied with the officer's request and the music was turned off and the fire was put out.

9. Officer Leal also asked the individuals in the group to provide identification. At this point plaintiff spoke up and said they did not have to provide identification because they were on private property. Defendant Leal repeated his request for plaintiff's identification several times and each time plaintiff refused. Other individuals in the group did provide identification to the defendants.

10. Plaintiff testified that he knew that failure to provide identification on request by a police officer was an arrestable offense. In fact, plaintiff was arrested for failing to provide a police officer with identification in another incident sometime in March of 1980.

11. After plaintiff's continuing refusal to provide identification, Defendant Leal walked over to plaintiff and attempted to place him under arrest. By this time Leal and Gonzales were outside the yard near a three to four foot high chain-link fence. After grabbing plaintiff's left hand and placing it in handcuffs, Defendant Leal attempted to grab plaintiff's right hand and pull it behind plaintiff's

back. Plaintiff complained to Defendant Leal that he had recently had an operation on his right wrist and that defendant was hurting him. Plaintiff resisted defendant's effort to place his right hand in handcuffs and was pulling his right arm toward the front of his body away from Defendant Leal. In order to gain control over plaintiff, Defendant Leal twice pushed plaintiff into the fence in an effort to handcuff him completely. In the struggle both plaintiff and defendant fell against the fence. Plaintiff was not injured when he was pushed twice into the fence.

12. Defendant Leal decided to push plaintiff into a firm object in order to complete the arrest. It is proper police procedure to push a resisting suspect against a firm object such as a brick wall or a vehicle in order to complete handcuffing a suspect.

13. In order to bring plaintiff under control, Defendant Leal pushed plaintiff onto a nearby vehicle, using his body weight as leverage against plaintiff's back. Upon being pushed against the car by Defendant Leal, plaintiff struck his nose against the vehicle. The impact caused a lceration and fracture of the nose. Defendant Leal testified that plaintiff suffered heavy bleeding as a result of the laceration.

14. During the altercation between Gonzales and Leal, Defendant Gallardo was standing to the side watching the other individuals in the group. At no time before plaintiff's nose struck the car, did Defendant Gallardo touch plaintiff.

15. After plaintiff suffered the injury to his nose, Defendant Gallardo came to Defendant Leal's aid and assisted him in completing the handcuffing of plaintiff.

16. At Defendant Leal's instruction, Gallardo radioed an EMS unit to come to the scene to assist plaintiff. It is standard San Antonio Police Department procedure to call for medical assistance when a suspect has been injured.

17. Defendant Leal placed plaintiff under arrest for failure to identify. When Plaintiff was actually taken to the Bexar County Jail, he was booked on the charge of public intoxication.

18. Defendant Gallardo placed Gabriel De Leon under arrest for public intoxication and drove De Leon away in his squad car.

19. When the EMS unit arrived on the scene shortly after plaintiff was placed under arrest, plaintiff refused medical assistance.

20. After placing plaintiff in the squad car, Defendant Leal drove plaintiff to a medical clinic to receive treatment for his injury. Plaintiff again refused treatment. Under San Antonio Police Department procedure, Defendant Leal was required to receive medical authorization before taking an injured suspect to be booked at the Bexar County Jail. After receiving the signature from the receiving doctor, Leal took plaintiff to the Bexar County Jail where plaintiff was booked on the charge of public intoxication. The following morning the plaintiff was released from jail. On December 18, 1983, plaintiff went to Santa Rosa Hospital's Emergency Room to receive treatment

for his injuries. Approximately two weeks later, Dr. Francisco Gallegos performed surgery on plaintiff to repair plaintiff's fractured nose.

21. Owing to defendant Leal's superior size, Leal could have seriously injured plaintiff if he had desired to.

22. The only injury plaintiff received was caused by his nose striking against the vehicle while he was being handcuffed. At no time during this entire episode did either Defendants Leal or Gallardo kick, hit, strike or beat plaintiff.

23. All findings of fact which may constitute conclusions of law are hereby adopted as conclusions of law. Similarly, all conclusions of law which may constitute findings of fact are also adopted as findings of fact.

CONCLUSIONS OF LAW

1. This Court has jurisdiciton over this action pursuant to 28 U.S.C. §1343.

2. All necessary jurisdictional prerequisites have been satisfied.

3. Plaintiff complains that the force used by Defendant Leal on December 17, 1983, violated his federal civil rights and is actionable under 42 U.S.C. §1983. In order to state a claim for relief pursuant to Section 1983 based on excessive force, plaintiff must prove:

> The state officer's action caused severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than careless or unwise excess of

zeal so that it amounted to an abuse of official power that shocks the conscious...Schillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981); see also Coon v. Ledbetter, 780 F2d 2258 (5th Cir. 1986); Henshaw v. Doffer, 785 F2d 1260 (5th Cir. 1986).

Based upon the efidence heard, the Court concludes that the force used by Officer Leal to effect the lawful arrest was necessary. Under the circumstances, it was necessary for Defendant Leal to push the resisting plaintiff against a vehicle in order to handcuff the suspect. Plaintiff has failed to prove the defendant acted with malice or used force which was grossly disproportionate to the need for action. Certainly the conduct of Defendant Leal does not rise to the level of gross abuse of power actionable under Section 1983.

4. A fortiori, Defendant Gallardo cannot be liable under Section 1983. Assuming arguendo that Defendant Leal's use of force was constitutionally impermissible and Defendant Gallardo had a duty to aid plaintiff and prevent Defendant Leal from injuring plaintiff, there is no evidence that Defendant Gallardo knew that Leal intended to injure plaintiff or that Gallardo had a sufficient opportunity to intervene. In short, the struggle between Officer Leal and Mr. Gonzales occurred very quickly and afforded Officer Gallardo no opportunity to act.

It is therefore ORDERED that Plaintiff's claims under 42 U.S.C. §§1983 and 1988 are DISMISSED with prejudice.

SIGNED and ENTERED this 26th day of January, 1987.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE.

(2)

SUPREME COURT, U.S.
FILED
MAR 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1405

In The
Supreme Court of the United States
October Term, 1987

JUAN GONZALES, JR.,

Petitioner,

v.

RUDY LEAL, JR.; MARC GALLARDO; and THE CITY OF SAN ANTONIO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth U.S. Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Under 42 U.S.C. § 1983, what standard of conduct is applied to an arresting officer to determine whether the arrestee has suffered a violation of his constitutional rights.

LIST OF PARTIES

1. JUAN GONZALES, JR., Petitioner
2. RUDY LEAL, JR., Respondent
3. MARC GALLARDO, Respondent
4. THE CITY OF SAN ANTONIO, TEXAS, Respondent

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No. 87-1405

In The
Supreme Court of the United States
October Term, 1987

JUAN GONZALES, JR.,

Petitioner,

v.

RUDY LEAL, JR.; MARC GALLARDO; and THE CITY OF SAN ANTONIO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth U.S. Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents, Rudy Leal, Jr. and Marc Gallardo, respectfully submit their Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth U.S. Circuit.

CITATION TO OPINIONS BELOW

Petitioner accurately states the status of the opinions below in his Petition for Writ of Certiorari.

JURISDICTION

Petitioner accurately states his allegation of jurisdiction in his Petition for Writ of Certiorari.

STATUTE INVOLVED

42 U.S.C. § 1983. Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
>
> R.S. § 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

STATEMENT OF THE CASE

1. Petitioner is substantially accurate in his recitation of the Course of Proceedings in his Petition for Writ of Certiorari.

2. Petitioner's recitation in the Facts Material to the Question Presented is selective and does not present a fair version of the testimony of the witnesses. Respondents will limit their response to some necessary additions and clarifications.

The Petitioner's testimony adduced at trial was not uncontroverted. There exists a wide disparity with respect to who used force, when and how much. There was testimony that at the precise point in the arrest procedure that the altercation made the basis of Petitioner's claim occurred, Peitioner was not handcuffed. There is testimony that Officer Leal had made a decision to arrest Petitioner and had fastened a handcuff to Petitioner's left wrist. At that point, Petitioner began to resist the arrest whereupon Officer Leal, engaging in proper police procedure, attempted to position Petitioner between himself and a solid object so as to gain the advantage of leverage and complete his handcuffing of the Petitioner.

The testimony of the seven (7) other witnesses referred to in Petitioner's Petition for Writ of Certiorari at Page 3 notwithstanding, Petitioner himself admitted, under examination by the court, that only one handcuff had been placed on him at the time he was pushed up against the car. (App. at 1).

SUMMARY OF ARGUMENT

1. There is no conflict in decisions on the standard applicable to violations under section 1983. Nine of the twelve federal circuits that have spoken to the issue use the same or a substantially similar analysis.

2. The analysis currently utilized by a majority of the circuits in analyzing violations of section 1983 comports with the principles announced in *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Baker v. McCollan*, 443 U.S. 137 (1979).

———o———

ARGUMENT

I.

THERE IS NO CONFLICT IN DECISIONS ON THE STANDARD APPLICABLE TO VIOLATIONS UNDER 42 U.S.C. §1983.

As this court recognized in *Baker v. McCollan*, 443 U.S. 137 (1979), violations of the duty of care arising out of tort law are not actionable under section 1983. A mere battery, without more, does not become a constitutional violation merely because Respondents herein were police officers in the exercise of their duties and ostensibly acting under color of state law. *See Mills v. Smith*, 656 F.2d 337, 340 n.2 (8th Cir. 1981); *see also Parratt*, 451 U.S. at 544; *Baker*, 443 U.S. at 146. Petitioner's proper remedy, if any exists, is under the laws of the state of Texas and the tort principals embodied therein. Having never before complained about the *Shillingford* standard, *see Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981), and only

after failing to prevail in both the trial court and the court of appeals, Petitioner now complains that the standard utilized in this case is too "onerous." (Petition for Writ of Certiorari at 2). Respondents will here detail their contention that the disparity in the circuits perceived by Petitioner does not in fact exist and that the majority of the circuits that have decided this question are in general agreement with regard to the amount of force necessary to trigger the protections of 42 U.S.C. § 1983.

Petitioner is incorrect in his assertion with respect to the Court of Appeals' opinion in *McKenzie v. Lamb,* 738 F.2d 1005 (9th Cir. 1984). While it is true no physical harm was inflicted on Plaintiffs in that case, the court of appeals' reversal seems to have turned on whether there were any material facts in dispute with respect to the question of probable cause to arrest the Plaintiffs and whether summary judgment was proper. The court was charged with the task of determining whether probable cause to arrest the Plaintiffs existed as a matter of law. *Id.* at 1007. According to the court's opinion, in a section 1983 action:

> the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury, *see Smiddy v. Varney,* 665 F.2d 261, 265 (9th Cir. 1981), *cert. denied,* 459 U.S. 829, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982); *Gilker* [v. Baker], 576 F.2d [245] at 247 [(9th Cir. 1978)]; and summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest.

Id. at 1008.

The court concluded that appellants had presented sufficient evidence to make out a claim for "excessive

use of force." After detailing the evidence and construing same in the light most favorable to the party opposing the summary judgment, as the court was required to do pursuant to this Court's opinion in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), the court reversed the district court's grant of summary judgment on the issue of use of excessive force. *McKenzie*, 738 F.2d at 1011. The effect of this conclusion was merely that movants in the district court had failed to carry their burden of persuasion. Most importantly, the court of appeals stated "the reasonableness of force should be analyzed in light of such factors as the requirements for the officers' safety, the motivation for the arrest, and the extent of the injury inflicted. *Roberts v. Marino*, 656 F.2d 1112, 1114 (5th Cir. 1981)." *Id.* at 1011.

The Ninth Circuit made specific reference to the *Roberts* opinion which was, in turn, based upon *Shillingford*. *Roberts*, 656 F.2d at 1114. Therefore, the standard to be used in determining whether the force used to effectuate an arrest was reasonable is similar in the Fifth and Ninth Circuits.

Petitioner's reliance on the Second Circuit's opinion in *Bellows v. Dainack*, 555 F.2d 1105 (2d Cir. 1977), is equally misplaced. That case involved two police officers appealing an adverse judgment entered in favor of an arrestee in the district court. The court of appeals reversed and remanded the judgment against the police officers for the reason that counsel for p' intiff engaged in improper jury argument which "seriously prejudiced the defendants' right to a fair trial." *Id.* at 1108. The court's opinion cannot fairly be stated to hold that the

plaintiff's constitutional rights had been violated affording him relief under 42 U.S.C. § 1983. In a footnote, the court recognized that local law enforcement officers who act under color of state law and who use excessive force in enforcing state laws are subject to civil liability under section 1983 when their actions deprive persons of rights guaranteed by the Constitution and laws of the United States. *See id.* at 1106 n.1. The court did not analyze the force used and did not determine that it was either excessive or not excessive. Neither did the opinion reveal any standard of review with regard to determining whether force used in effectuating an arrest is so excessive as to constitute a violation of an arrestee's constitutionally protected rights. Such a determination was unnecessary in view of the reversal and remand of the judgment against the police officers on the basis of improper jury argument.

In fact, the analysis stated in *Shillingford* has its genesis in the Second Circuit opinion of *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom. John v. Johnson,* 414 U.S. 1033 (1973), which was decided by the Second Circuit some four years prior to its opinion in *Bellows.* The portion of the *Shillingford* opinion attacked by Petitioner in the instant case is based upon Judge Friendly's opinion in *Johnson. See Shillingford,* 634 F.2d at 265. Therefore, Respondents respectfully submit that the Court of Appeals' opinion in *Bellows v. Dainack* does not support Petitioner's contention that there are "varying standards resulting in an inequitable application of 42 U.S.C. 1983." (Petition for Writ of Certiorari at 4).

Similarly, the Eighth Circuit Court of Appeals' opinion in *Patzner v. Burkett,* 779 F.2d 1363 (8th Cir. 1985), is of no help to Petitioner in his attempt to establish the

lack of a uniform standard among the circuits. In deciding whether the officers' use of force to arrest plaintiff was reasonable, the court noted that the matter was before them on an appeal from a summary judgment and that their holding reversing the district court's conclusion that the degree of force used in arresting the plaintiff was reasonable as a matter of law was "limited to the recognition that the alleged use of excessive force is generally an issue of fact." *Id.* at 1371.

In stating the factors relevant to a determination of whether the use of force was reasonable and properly motivated, the court quoted *Putnam v. Gerloff*, 639 F.2d 415, 420 (8th Cir. 1981) and *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033, 94 S.Ct. 462 (1973).

The language of *Putnam* and *Johnson* relied upon by the Eighth Circuit is as follows:

> [A] court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id. at 1371.

It is abundantly clear that the factors used by the Second and Eighth Circuits are similar if not the same as the factors enumerated in *Shillingford*. *See* 634 F.2d at 265. The cases relied upon by Petitioner reveal that the extent of injuries suffered by the arrestee and whether the officer inflicted those injuries maliciously are factors used in those circuits.

Respondents respectfully submit Petitioner's allegation that *Shillingford* requires a showing of "severe injuries" inflicted on an arrestee as a prerequisite to a finding of a constitutional violation is incorrect. (Petition for Writ of Certiorari at 4). The *Shillingford* opinion sets out the factors to be considered in determining whether physical abuse meted out by a police officer is actionable under section 1983. Immediately following these factors, the court gave an example that should an officer's action cause severe injuries, be grossly disproportionate to the need for action under the circumstances and be inspired by malice rather than mere careless or unwise excessive zeal so that it amounts to an abuse of official power that shocks the conscious, then it should be redressed under section 1983. *Id.* at 265.

In *Hinshaw v. Doffer*, 785 F.2d 1260 (5th Cir. 1986), the court was reviewing a defendant officer's allegation that the district court improperly denied his motion for directed verdict, motion for judgment notwithstanding the verdict and motion for a new trial. The court reviewed the facts pursuant to its opinion in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc) to determine whether the defendant was entitled to relief. Apparently, the *Hinshaw* court concluded, after reviewing the facts under the *Boeing* standard, that the officer was liable to plaintiff under section 1983 as a matter of law. The court found that the plaintiff suffered severe injury, that the officer engaged in action grossly disproportionate to the need for such action and, finally, that the officer's action was inspired by malice. The court, therefore, concluded that the district court properly denied the officer's

motion for directed verdict, for judgment notwithstanding the verdict, and for new trial. *Id.* at 1267-68.

Finally, in *Hinojosa v. City of Terrell*, 834 F.2d 1223 (5th Cir. 1988), the Fifth Circuit once again had the opportunity to review an excessive use of force claim. In that case, a pool hall operator brought an action against, among others, a police officer alleging civil rights violations and several pendant state law claims arising from his arrest. The district court's judgment was based upon a jury verdict finding, *inter alia*, that the police officer used excessive force against Hinojosa during the arrest. *Id.* at 1224. As in the instant case, Hinojosa did not complain either in the district court or on appeal to the use of the *Shillingford* standard. The court stated that *Shillingford* was developed in recognition of the need to distinguish potential constitutional violations from mere breaches of state law pursuant to this Court's opinion in *Baker*. The Fifth Circuit concluded that "*Shillingford* limits redress under section 1983 to police conduct that (1) caused at least meaningful injury, (2) was grossly disproportionate to the need presented, and (3) was motivated by malice." *Id.* at 1229. In the *Hinojosa* case, the plaintiff suffered no injury but claimed that the excessive use of force was evidenced by the police officer pointing a gun at him.

The Fifth Circuit ultimately reversed the judgment entered by the district court on the excessive use of force claim. The court recognized that plaintiff, Hinojosa, suffered no other injury other than "the understandable immediate emotional distress . . . at being the target of the gun point." *Id.* at 1230. The court went on to state, how-

ever, that it was not determining whether some type of physical injury would in every instance be necessary for section 1983 liability on a claim of excessive use of force and cited the opinions in *Gumz v. Morrissette,* 772 F.2d 1395, 1400-02 (7th Cir. 1985), *cert. denied,* 475 U.S. 1123 (1986), and *Black v. Stephens,* 662 F.2d 181, 189 (3d Cir. 1981). *See Hinojosa,* 834 F.2d at 1230.

Due to the complexity presented by these types of claims and the various fact situations in which they are formed, Respondents respectfully submit that no "bright line" rule can be formulated to determine whether excessive force has been used in effectuating an arrest. *See Shillingford,* 634 F.2d at 265. Petitioner asks this Court to determine whether malice must be proved in order to prevail on a 1983 action alleging excessive use of force. (Petition for Writ of Certiorari at 5). Respondents respectfully submit that the malice requirement is an important one in determining whether the actions of an officer acting under color of law transcend the bounds of tort liability and amount to a violation of a constitutionally protected right triggering the protections of section 1983.

II.

IMPORTANT QUESTION OF FEDERAL LAW

Petitioner cites this Honorable Court's opinions in *Baker v. McCollan* and *Parratt v. Taylor* and states that since that time, the circuits have been free to formulate their own standard of review and that the circuits are not uniform in their review of 1983 claims. Petitioner asks this Court to determine a uniform standard to be followed

by all circuits in determining what level of force is excessive and, therefore, violative of an arrestee's constitutional rights.

Respondents respectfully submit that the standard promulgated by the Fifth Circuit in *Shillingford* is substantially similar to the analysis utilized by Judge Friendly in the Second Circuit's opinion of *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973). In that case, the court stated:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id. at 1033.

The portion of the *Shillingford* opinion that contains the three-pronged analysis attacked by Petitioner cites to *Johnson* and the Fourth Circuit's opinion in *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980). In that case, the Fourth Circuit adopted the analysis first used in *Johnson* and applied it in analyzing whether a student's constitutionally protected rights had been violated in the course of receiving corporal punishment. *Id.* at 613. The Fourth Circuit recently adopted this analysis in reviewing excessive use of force claims against police officers. *See Justice v. Dennis*, 834 F.2d 380, 383 (4th Cir. 1987). Recently, the same standard has been adopted by several of the circuits. *See, e.g., H.C. by Hewett v. Garrard*, 786

F.2d 1080, 1085 (11th Cir. 1986) (*Shillingford* analysis used to determine whether juvenile detention center detainee's constitutional rights violated by superintendent of detention center); *Lewis v. Downs*, 774 F.2d 711, 713 (6th Cir. 1985) (*Johnson* analysis used to determine whether arrestee's constitutionally protected rights violated by police officer effecting arrest); *Gumz v. Morrissette*, 772 F.2d 1395, 1400 (7th Cir. 1985) (*Shillingford* analysis utilized to determine whether warden violated rights of farmer in manner in which arrest warrant executed); *Davis v. Forrest*, 768 F.2d 257, 258 (8th Cir. 1985) (jury instruction in 1983 action based upon *Shillingford* upheld); *Hewitt v. City of Truth or Consequences*, 758 F.2d 1375, 1379 (10th Cir.), *cert. denied*, 474 U.S. 844 (1985) (*Shillingford* standard used to determine whether death of plaintiff's decedent due to excessive force on part of police officers); *Wise v. Bravo*, 666 F.2d 1328, 1333-34 (10th Cir. 1981) (*Shillingford* utilized to determine whether plaintiff's constitutionally protected rights violated by police officers).

The Third Circuit uses a similar type of analysis. In *Black v. Stephens*, 662 F.2d 181, 188 (3d Cir. 1981), the court stated that for a common law tort committed by a police officer to rise to the level of a constitutional harm actionable under section 1983, one must determine whether the police officer's conduct "shocks the conscience." The court also stated that the due process clause in the eighth amendment extends to protection from an official's abusive exercise of his powers to inflict grossly undue harm. *Id.* While not precisely tracking the language in *Johnson* or *Shillingford* or the later opinions adopting the majority

view, the successful plaintiff must nevertheless establish conduct on the part of a police officer evidencing injuries sufficient to shock the conscience. The standard of review used by the Third Circuit is substantially similar to that used in the circuits detailed above. The requirement of substantial harm so as to shock the conscience is necessary so as to avoid the use of the United States Constitution as a theory of recovery in tort cases. *See Parratt v. Taylor*, 451 U.S. 527, 544 (1981); *Paul v. Davis*, 424 U.S. 693, 701 (1976).

The complexity of the issues presented in an excessive use of force claim seeking redress under section 1983 coupled with the almost innumerable fact patterns in which they may arise does not permit the formulation of a single generic standard to be used in analyzing such claims. *See Baker v. McCollan*, 443 U.S. 137, 139-40 (1979). The perceived disparity in the standards utilized in the circuits that have decided these questions, upon close examination, does not exist. Nine of the twelve federal circuits use an analysis that is, for the most part, the same. Therefore, the circuits, to this point in time, are uniform in their review of excessive use of force claims under section 1983.

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CONCLUSION

The decision of the Fifth Circuit in this case and its use of the three-pronged analysis found in its opinion in *Shillingford* is correct. The three-pronged test, while onerous from the standpoint of establishing tort liability, insures that only those actions by police officers amounting to a deprivation of a constitutionally protected right will be redressed under section 1983.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX NO. 1

TRIAL EXCERPT

THE COURT: There was about five feet between the fence and the car and you and the Policeman were between there and you say he pushed you back on the fence and then he pushed you back on the car to try to put handcuffs on you?

A. Yes. He had put one handcuff on me.

THE COURT: He pushed you up against the car and tried to put the handcuffs on?

A. When he pushed me, threw me up against the car, that is when he was trying to put my handcuffs on and I was telling him it was hurting me, when I was going like this and that is when he got me and pushed me against the trunk on the car, Carlos' car and that is how the rest of the blood was there where he handcuffed me.

1-176 to 1-177